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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation,

and

JOHN W. HOWELL, an Individual,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation,

and

JOHN W. HOWELL, an Individual,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Petitioners, Chatsworth Cooperative Marketing Association, an Illinois corporation, and John W. Howell, respectfully pray for the issuance of a Writ of Certiorari which shall review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 24, 1965.

OPINIONS BELOW.

A consent judgment was entered on December 3, 1964, by the United States District Court for the Northern District of Illinois, Eastern Division, providing for the postponement of the entry of a permanent injunction pending the Petitioner's pursuit of an appeal to its final determination on the ground that the Interstate Commerce Commission was without authority to bring the instant action under Section 322 (b), 49 U.S.C.A., in that said section is unconstitutional. Said injunction, when effective, will restrain the Petitioners from engaging in any for hire transportation business by motor vehicle in interstate commerce, without first obtaining a permit issued by the Interstate Commerce Commission authorizing them to engage in such operations and business and/or otherwise lawfully operating. A copy of the judgment order appears on Page 5a of the Appendix. The decision was unreported.

The decision of the United States Court of Appeals for the Seventh Circuit, affirming said judgment order entered on June 24, 1965, and upholding the constitutionality of Title 49, U.S.C.A., Section 322 (b), appears on Page 1a of the Appendix. The decision of the United States Court of Appeals for the Seventh Circuit is, as of yet, unreported in the official reports.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit, (Appendix Page 4a), denying Petitioner's Petition for Rehearing, was entered on August 16, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1); and 28 U.S.C. 2106.

QUESTION PRESENTED FOR REVIEW.

Under the provisions of Article II, Sections 1 and 3 of the United States Constitution, providing that "the executive Power shall be vested in a President of the United States of America" . . . and . . . "he shall take Care that the Laws be faithfully executed, . . ." is Congress precluded from vesting in the Interstate Commerce Commission, a non-executive agency in the constitutional sense, and "its duly authorized agents", the discretion and power to initiate judicial proceedings, pursuant with the enabling statute, Title 49 U.S. Code, Section 322(b), to enforce the Interstate Commerce Act?

CONSTITUTIONAL AND STATUTORY LAW INVOLVED.

Article II, Section I, Constitution of the United States:

> "The Executive power shall be vested in the President of the United States of America."

Article II, Section 3, Constitution of the United States:

> ". . . He shall take care that the laws be faithfully executed. . . ."

Title 49, U.S.C.A., Section 322 (b)

> "(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order, thereunder, or of any term or condition of any certificate or permit, *the Commission or its duly authorized agent may apply* to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ

of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto." (Emphasis Added)

STATEMENT OF THE CASE.

Defendant, Chatsworth Cooperative Marketing Association, is a corporation, organized as an agricultural co-operative association under the laws of the State of Illinois, and is engaged in the business of transporting for members and non-members, certain commodities in interstate commerce; the Defendant, John W. Howell, is an Officer of Chatsworth Cooperative Marketing Association.

This action was brought by the Respondent, Interstate Commerce Commission, seeking to obtain a permanent injunction against the Petitioners, perpetually restraining them from engaging in any transportation business in interstate or foreign commerce and also seeking various other forms of relief. Jurisdiction to pursue this cause of action was invoked by the Respondent, Interstate Commerce Commission, under the provisions of Title 49, United States Code, Section 322 (b), set forth on Page 3), of this Petition, hereinafter referred to as the "Enabling Act."

Your Petitioners filed their motion to dismiss said cause of action, contending, among other things, that the "Enabling Act" was unconstitutional in that it violated the doctrine of Separation of Government powers.

On October 21, 1963, the United States District Court for the Northern District of Illinois, Eastern Division, denied your Petitioner's Motion to Dismiss said cause.

On December 3, 1964, a consent judgment was entered by said District Court, (Appendix Page 5a), providing, for the ultimate issuance of a perpetual injunction against the Petitioners, the date of said injunction being postponed to allow your Petitioners to pursue an appeal to its final determination, solely upon the grounds that the Interstate Commerce Commission was unable to bring this action under the "Enabling Act", in that said statute is unconstitutional and unlawful. Pursuant with said consent judgment, your Petitioners took an appeal to the United States Court of Appeals for the Seventh Circuit.

Accordingly, there is no factual question presented for your Honor's consideration and the sole issue raised by your Petitioners, relates to the constitutionality of the "Enabling Act."

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals for the Fifth Circuit, on January 26, 1965, rendered a decision in conflict with the decision of the United States Court of Appeals for the Seventh Circuit, upon the issue to be resolved in the case at bar.

The decision of the United States Court of Appeals for the Seventh Circuit, in the case at bar, has chartered a *collision course* with a conflicting decision rendered by the United States Court of Appeals for the Fifth Circuit, upon the pivotal issue of whether or not the initiation of a judicial proceeding by our government, or an agency thereof, on behalf of the people of the United States, to enforce the laws of the land *is an exercise of a constitutional power exclusively vested in the President.*

It is accordingly necessary for your Honors to grant Certiorari to avoid irreparable damage to the ship of State, upon a constitutional issue that has a vital day to day effect upon the conduct of our government.

The recent case of *United States* v. *Cox,* 342 F2d 167, (1965), Certiorari denied June 1, 1965, see, 85 S.Ct. 1767, determined that the governmental power to initiate a judicial action to enforce the federal laws was a pure executive power, within the scope of the Presidential mandate conferred by U.S.C.A., Const., Art. 2, Sections 1 and 3, requiring that the President take care that the laws are faithfully executed.

The *Cox* case, 342 F2d 167, at page 171, held:

> "The Executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the

laws of the United States in *legal proceedings and in the prosecution of offenses,* be faithfully executed. . ."

"The discretionary power of the Attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the Attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States. . . ." (Emphasis added).

In a determination that your petitioners contend is constitutionally unsound, the United States Court of Appeals for the Seventh Circuit, in the case at bar, took a position wholly antagonistic with the decision of the United States Court of Appeals for the Fifth Circuit, in the *Cox* case, 342 F. 2d 167, and characterized the act of initiating a judicial proceeding to enforce the federal laws, on behalf of the "People," as *a function* that does not require executive discretion and hence, may be performed by an independent administrative agency, not subject to the President's control, in the furtherance of its quasi-judicial powers, stating:

". . . (powers of law enforcement) are assigned under our Constitution to the Executive and the Judiciary."

"And, in our judgment, the function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercising of a prerogative exclusively reserved to the President. It is not

> an action not subject to judicial check and thus appropriately one of executive province." (Appendix page 3a).

Paradoxically, while the Court of Appeals for the Fifth Circuit held that the government's bringing of a judicial action is in the furtherance of a pure executive power that is not subject to judicial encroachment, the Court of Appeals for the Seventh Circuit, would apparently entrust this executive power to the Interstate Commerce Commission, pursuant with the exercise of said agency's "quasi-judicial" powers. It must necessarily follow, that *inasmuch as the pure judicial power, under the Cox decision, 342 F.2d 167, cannot substitute for, or tamper with, this great executive power, namely, taking care that the laws of the United States, in legal proceedings, be faithfully executed, that a quasi-judicial power, could not be called upon to accomplish this result.*

To be sure, the powers of law enforcement are assigned under our Constitution to the Executive and Judiciary, to be shared, in that the Executive is constitutionally charged with the responsibility of initiating and prosecuting a legal action in the "People's" behalf, and the Judiciary is ultimately responsible for seeing to it that justice is dispensed; however, neither branch of government may assume or exercise the Constitutional powers and responsibilities of the other.

By reason of their fear of the onset of a tyrannical government, the framers of our Constitution limited the powers to be exercised to those conferred, and assigned the delegated powers among the three co-equal branches of government that it established. Inasmuch as Congress never, in the first instance, possessed the power to enforce the laws of the land, it could not delegate this

power to the Interstate Commerce Commission, a non-executive, governmental body, that would be fully within the intended scope of the trepidations of our founding fathers.

The pure executive power exercised by the President, through the office of the Attorney General, in instituting legal proceedings to assure the faithful execution of the federal laws, is not subject to the sanction or control of either of the other branches of government. When the President acts in furtherance of this constitutional authorization,

> "he is to use his own discretion and is accountable only to his country in his political character and to his own conscience." *Marbury* v. *Madison* 1 Cranch. 134, 165.

Within the framework of our constitutional system, neither Congress, nor the courts, could compel the President to initiate legal proceedings to assure the faithful execution of the federal laws. Conversely, Congress is not at liberty to remove this great constitutional power from the realm of the President and place it elsewhere. Once the law is written, its enforcement before the judicial tribunals on behalf of the "People" is solely dependent upon the exercise of the discretion of an agent of the President, rather than the exercise of a discretion of an agency that is not subject to his control. As was stated in *Meyers* v. *U.S.*, 272 U.S. 52, 117,

> "the vesting of the executive power in the President was essentially a grant of power to execute the laws. But the President alone and unaided cannot execute the laws. He must execute them by the assistance of his subordinates. This view has been repeatedly affirmed by this court . . .as he is charged specifically

> to take care that they be faithfully executed, the reasonable implication, even in the absence of the expressed words, was that as part of his executive power, he should select those who were to act for him, under his direction, in the execution of the laws."

It is beyond doubt that the power to proceed before the judicial tribunals, for the purpose of seeing that the laws of the United States are enforced, is a part and parcel of the power to "take care that the laws be faithfully executed," Article II, Section 3, of the United States Constitution, and that the Attorney General must exercise the President's discretion of determining when to proceed and/or whether to proceed at all.

> "If the United States in any particular case has a just cause for calling upon the judiciary of the country in any of its courts . . . the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States . . ." *U.S.* v. *Sam Jacinto Tin Co.*, 125 U.S. 273, 279, 31 L. Ed. 747, 8 S. Ct. 850 (1888).

As was stated in the concurring opinion of Circuit Judge Wisdom, *United States* v. *Cox,* 342 F2d 167, at pages 190 and 191:

> "The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General. 'There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof.' 5 U.S.C. Section 291. That official, the chief law-enforcement officer of the Federal Government is 'the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed.' *Ponzi* v. *Fassenden,* 1922, 258 U.S. 254, 262, 42 S. Ct. 309, 311, 66 L. Ed. 607. He 'has the authority, and it is

made his duty, to supervise the conduct of all suits brought by or against the United States', including the authority 'to begin criminal prosecution.' *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 278-79, 8 S. Ct. 850, 31 L. Ed. 747. He 'is invested with the general superintendence of all such suits, and all the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control.'" Id., p. 279, 8 S. Ct. at p. 853.

"All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power, The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting. The remedy for any dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people." *Pugach* v. *Klein*, S.D.N.Y. 1961, 193 F. Supp. 630, 635.

In the case of *Humphrey Executor* v. *U.S.*, 295 U.S. 602, 626-628, this Honorable Court determined that the Interstate Commerce Commission and like independent governmental agencies, were created for the purpose of carrying into effect legislative policies and held that:

'The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted."

". . . such a body cannot in any proper sense be characterized as an arm or an eye of the executive" and that it . . . "occupies no place in the executive department" . . . and . . . "exercises no part of the executive power vested by the Constitution in the President."

The United States Court of Appeals for the Seventh Circuit, in the case at bar, erroneously concluded that Congress could vest the Interstate Commerce Commission

with the great constitutional, presidential power of "taking care that the laws be faithfully executed", Article II, Section 3, of the United States Constitution, under the guise of allowing the administrative agency to perform an administrative function.

The act of initiating a judicial proceeding on behalf of the "People," is the exercise of an executive power and not an administrative function. By changing the label of the challenged governmental activity involved, from, on the one hand, an executive power, to, on the other hand, an administrative function, you can neither disguise the substance of the act's constitutional identity and origin, nor can you change the fact that the agency has exceeded its administrative bounds.

The *Cox* case, 342 F2d 167, at page 171, holds that the judiciary cannot tamper with the executive power involved in the case at bar. The case of *Springer* v. *Philipine Islands,* 277 U.S. 189, 200, holds that the "legislature cannot exercise either executive or judicial power", accordingly, the respondent cannot exercise an Executive power, pursuant with either quasi-legislative or quasi-judicial powers, inasmuch as that would permit the legislature to acquire and/or remove the power of the executive by indirection, and engraft upon the agent, a power that is denied to the principal.

The *Cox* decision, 342 F2d 167, further holds that whether the judicial action sought to be commenced on behalf of the "People", to enforce the federal laws, is criminal or civil, the power to be exercised comes under the heading of Article II, Section 3 of the United States Constitution, and the Attorney General, as the President's agent, must hold the reins; the decision of the United States Court of Appeals for the Seventh Circuit, in the case at bar, stands directly opposed.

It is imperative, in order to insure proper law enforcement, that the conflict of opinion between the United States Court of Appeals for the Fifth Circuit in the *Cox* decision, 342 F. 2d 167, and the determination of the United States Court of Appeals for the Seventh Circuit, in the case at bar, be resolved to the end that an efficient, coordinated system of law enforcement be re-established.

The constitutional issue involved herein is one of grave national concern and importance and demands an immediate answer by this court, to the question of whether or not an independent administrative agency, responsive neither to the direct will of the President, nor to the indirect control of the public, whose membership does not participate in meetings held at the cabinet round table, and are subject to removal for only "inefficiency, neglect of duties, or malfeasance in office", Title 49, U.S.C.A. (Section 11, page 555), may wield the great discretionary power of initiating lawsuits that may concern even delicate "civil rights" matters where, needless-to-say, a miscalculation by this non-political body may bring about disastrous ramifications.

Circuit Judge Brown, concurring specially in the *United States* v. *Cox*, 342 F. 2d 167, (1965), at page 182, ably advanced the position of your petitioners, in urging the reasons for the the need of the issuance of the Writ of Certiorari, in the instant action, when he stated:

> "Responsibility for determining whether a prosecution is to be commenced or maintained must be clearly fixed. The power not to initiate is indeed awesome. But it has to reside somewhere. And the more clearly pinpointed it is, the more the public interest is served through the focus of relentless publicity upon that decision. It may not, with safety, be left to a body whose great virtue is the combination of anonymity, transitory authority, and political unresponsibility."
>
> "All must be aware now that there are times when the interests of the nation require that a prosecu-

tion be foregone. These instances will most often be in the area of state secrets and national security. With stakes so high, the safety of our country, and hence the security of the world, ought not be imperiled by leaving the important decision to a body having no definitive political responsibility."

CONCLUSION.

Your Petitioners respectfully submit that the foregoing reasons require this Honorable Supreme Court to grant their Petition for the Issuance of a Writ of Certiorari, to clarify the scope of the President's constitutional power to initiate judicial actions to enforce the federal laws, and thereby resolve the conflict of authority between the Fifth and Seventh Circuits of the United States Court of Appeals.

Your Petitioners further pray, that upon hearing, your Honors will reverse the decision of the United States Court of Appeals for the Seventh Circuit, in the case at bar, and dismiss the instant action, holding, consistent with the decision rendered by the United States Court of Appeals for the Fifth Circuit, in *United States* v. *Cox*, 342 F. 2d 167, (1965), that the initiation of a judicial action, on behalf of the "People", to enforce the federal laws is the exercise of a power exclusively vested in the President under Article II, Sections 1 and 3, of the United States Constitution, and hence the "Enabling Act" is unconstitutional.

Respectfully submitted,

NORMAN MILLER
EARL G. SCHNEIDER
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MILLER, SCHNEIDER & GALASSO
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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14968
INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,
v.
CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, a Corporation,
and
JOHN W. HOWELL, an Individual,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 24, 1965

Before SCHNACKENBERG and CASTLE, *Circuit Judges,* and MERCER, *District Judge.*

CASTLE, *Circuit Judge.* Defendants-appellants, Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, prosecute this appeal from an injunctive order of the District Court entered in an action brought by the Interstate Commerce Commission to perpetually enjoin the defendants from engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce without authority from the Commission. By stipulation the defendants admitted the allegations of the complaint charging that the transportation operations engaged in by them were unlawful and in violation of the Interstate Commerce Act, and they limited their defense to the injunction sought to the

sole ground that 49 U.S.C.A. §322(b)[1] which empowers the Commission to apply to a district court to enjoin a violation of the Interstate Commerce Act is unconstitutional.

The defendants contend, in substance, that §322(b) in permitting "the Commission or its duly authorized agent" to initiate judicial proceedings to enforce the Interstate Commerce Act violates the constitutional grant of executive power to the President of the United States and his agents in that the section seeks to authorize an administrative agency of government, not a branch of the executive, to exercise discretion and power exclusively vested in the executive branch to the government by the provisions of Article II, Sections 1 and 3, of the United States Constitution that "[t]he executive Power shall be vested in a President of the United States of America" . . . and . . . "he shall take Care that the Laws be faithfully executed, . . .".

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[1] 49 U.S.C.A. §322(b) provides: "If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

But the powers of law enforcement are not wholly assigned to the executive department. Cf. *Quinn* v. *United States,* 349 U.S. 155, 161, where it is observed "those powers [powers of law enforcement] are assigned under our Constitution to the Executive and the Judiciary". And, in our judgment, the function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President. It is not an action not subject to judicial check and thus appropriately one of executive province. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 432. And the enforcement of any resulting judgment remains with the judicial or executive departments. Moreover, in *Humphrey's Executor* v. *United States,* 295 U.S. 602, it is recognized (295 U.S. 602, 628-629) that administrative bodies, such as the Interstate Commerce Commission, created by Congress to carry into effect legislative policies embodied in the statute, act "in part quasi-legislatively and in part quasi-judicially"; to the extent such a Commission "exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government", and "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted".

We have examined all of the cases cited and relied upon by the defendants, including *Kilbourn* v. *Thompson,* 103 U.S. 168 and *Myers* v. *United States,* 272 U.S. 52. In our opinion they do not sustain the defendants' contentions.

The judgment order appealed from is affirmed. A motion, taken with the case, for reconsideration of the denial of a motion of the defendants for a protective order pending appeal, is therefore moot.

AFFIRMED

Judge Schnackenberg concurs in the result.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, August 16, 1965

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,
No. 14968 *vs.*
CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that defendants-appellants' petition for a rehearing of this cause be, and the same is hereby, Denied.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 63 C 766) * *

120 CONSENT JUDGMENT.

I.

This cause coming on for hearing, and the Court after considering the Complaint and Stipulation of the parties filed herein, the Consent and representations of the parties in connection therewith, and the Court having jurisdiction of the parties and the subject matter of this action by virtue of the provisions of Part II of the Interstate Commerce Act, particularly Sections 204(a)(6) and 222(b) thereof (Title 49 U.S. Code 304(a)(6) and 322 (b)), and under the general laws and rules relative to suits in equity arising under the Constitution and laws of the United States;

121 II.

That the said acts of said Defendants, Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, as set forth in the Complaint and Stipulation, constitute violations of the provisions of Sections 203(c), 206(a) and 209(a) of the Interstate Commerce Act (Title 49 U.S. Code Sections 303(c), 306-(a) and 309(a)), and as such are subject to be enjoined by this Court on the application and suit of this Plaintiff under the express provisions of said Act, more particularly, Section 222(b) thereof (Title 49, Section 322(b), U.S. Code);

III.

That the Defendants, Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, have engaged in the acts as alleged in the

Plaintiff's Complaint and the relief prayed for by the Plaintiff in its Complaint and stipulated to by the parties should be granted in accordance with the stipulation of the parties.

It Is Hereby Ordered, Adjudged And Decreed that

A. Defendants Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, jointly or severally, their members, agents, employees, and representatives, and all others acting by or under their direction or authority, and all persons in active concert or participation with them, be perpetually enjoined and restrained from in any manner, or by any device, directly or indirectly

122 1. Engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce, on any public highway unless there is in force with respect to Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, a certificate or permit issued by the Commission authorizing such transportation, or are otherwise lawfully operating.

2. Transporting or holding themselves out to transport property for the general public in interstate commerce by motor vehicle for compensation on public highways, and engaging in interstate operations as a common carrier by motor vehicle unless and until such time, if at all, as there is in force with respect to said Chatsworth Co-operative Marketing Association, a corporation, and John W. Howell, an individual, jointly and severally, a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such transportation and operations, or are otherwise lawfully operating.

3. Transporting or holding themselves out to transport property in interstate commerce by motor vehicle for compensation on public highways under individual contracts or agreements and not for the general public, and engaging in the business of a contract carrier by motor vehicle, unless and until such time, if at all, as there is in force with respect to said Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, a permit issued by the Interstate Commerce Commission authorizing them to engage in such operations and business, or are otherwise lawfully operating.

123 B. That Defendant John W. Howell, and his agents, employees, representatives, and all others acting by or under his direction or authority, and all other persons in active concert or participation with him be perpetually enjoined or restrained from in any manner or by any device, directly or indirectly, aiding, directing, controlling, utilizing said Chatsworth Cooperative Marketing Association or any other transportation company engaged in any for-hire, common carrier, or contract carrier business by motor vehicle in interstate or foreign commerce on any public highways unless there is in force with respect to Chatsworth Cooperative Marketing Association a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission authorizing them to engage in such transportation business, or are otherwise lawfully operating.

It Is Further Ordered, Adjudged And Decreed that upon the Defendants posting a $500.00 supersedeas bond, the effective date of the Order shall be postponed until said Defendants, within the statutory period of time allowed, pursue an appeal to its final determination, solely

on the ground that the Interstate Commerce Commission was without authority to bring the instant action under Section 322(b), 49 U. S. Code, in that said section is unconstitutional and/or unlawful.

124 Done in open court this 3rd day of December, 1964, at Chicago, Illinois.

/s/ Igoe
United States Judge

The entry of the foregoing judgment is hereby consented to:

Interstate Commerce Commission,
Plaintiff in the above-entitled cause,

By: /s/ Arthur I. Flauman
its attorney.

Chatsworth Cooperative Marketing Association, a corporation, and John W. Howell, an individual, Defendants in the above-entitled cause,
Miller, Schneider & Galasso

By: /s/ Earl G. Schneider
their attorneys.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 552

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to Section 222(b) of the Interstate Commerce Act, 49 U.S.C. Section 322(b), the Interstate Commerce Commission instituted this proceeding to enjoin petitioners from engaging in interstate for-hire transportation without first obtaining the requisite operating authority from the Commission. On December 3, 1964, petitioners entered into a stipulation admitting that the transportation operations conducted by them are in violation of the Interstate Commerce Act. A consent decree was entered by the district court pursuant to that stipulation, but the effective

date was postponed to permit petitioners to pursue their right to appeal. Petitioners' application for a writ of certiorari is predicated on the contention, rejected by the court of appeals (Pet. 1a-3a), that the Interstate Commerce Act unconstitutionally trenches on the President's power to execute the laws of the United States because Section 222(b) enables the Commission to sue in a district court to enforce the Act.

The court of appeals was clearly correct in ruling that "the function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President" (Pet. 3a). The authority of Congress to delegate to administrative agencies the implementation and enforcement of statutory standards is no longer open to question. By Section 222(b), Congress has simply authorized the Commission, in its own name, to apply to the appropriate district court for an injunction to restrain activities in violation of the Interstate Commerce Act. The right of the Commission to proceed under that Section has been considered and affirmed. See, *e.g.*, *United States and Interstate Commerce Commission* v. *Lassiter*, 203 F. Supp. 20 (W.D. La.), affirmed, 371 U.S. 10; *United States and Interstate Commerce Commission* v. *City of Jackson, Mississippi*, 318 F. 2d 1 (C.A. 5). Similar authority has been conferred by statute on various other administrative agencies,[1] and the issuance of injunctions pur-

[1] *Eg.* 49 U.S.C. 1487 (Civil Aeronautics Act); 15 U.S.C. 77v(a) (Securities Act); 15 U.S.C. 78aa (Securities Ex-

suant to such statutes has been sustained by this Court with no hint of constitutional infirmity. *E.g.*, *Porter, Price Administrator* v. *Warner Holding Co.*, 328 U.S. 395; *Capital Service Inc.* v. *National Labor Relations Board*, 347 U.S. 501; cf. *Deckert* v. *Independence Corp.*, 311 U.S. 282; see *Federal Housing Administration* v. *Burr*, 309 U.S. 242.

There is no conflict with *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), certiorari denied, 381 U.S. 935 (Pet. 6-14). The *Cox* case merely held that a United States Attorney cannot be compelled to sign an indictment returned by a grand jury in a criminal proceeding, and that his signature is essential to the validity of the indictment. That holding is plainly irrelevant to the question presented here.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,

BERNARD A. GOULD,
Assistant Director,
Bureau of Enforcement,
Interstate Commerce Commission.

OCTOBER, 1965

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change Act); 15 U.S.C. 79y (Holding Company Act); 16 U.S.C. 825m (Federal Power Act); 15 U.S.C. 53 (Federal Trade Commission Act); 29 U.S.C. 160(l) (National Labor Relations Act); 12 U.S.C. 1702 (National Housing Act).

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No. 552

In the
Supreme Court of the United States
OCTOBER TERM, 1965

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, ET AL.,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY TO MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION TO PETITION FOR CERTIORARI.

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REPLY TO MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION TO PETITION FOR CERTIORARI.

With expertness, the Interstate Commerce Commission's Memorandum Brief in opposition to the instant Petition for Certiorari wilily displays adeptness at begging the great constitutional question before this Honorable Court.

In endeavoring to assure Your Honors that the Writ needn't issue, the Commission cautiously avoids responding to the posed constitutional issue, and speciously asserts that authority for the challenged act was granted by Congress and that its right to proceed, pursuant therewith, has heretofore been considered and affirmed.

Most assuredly, judicial consideration of the constitutionality of a statute does not become precluded upon its legislative enactment. Even in this era of expediency, the ultimate source of authority for a federal agency's activity is still our Constitution.

The Commission intimates that the constitutional validity of Title 49, U.S.C., Section 322(b), was affirmed by, *United States and Interstate Commerce Commission* v. *Lassiter,* 203 F.Supp. 20 (W.D. La.), affirmed, 371 U.S. 10; and *United States and Interstate Commerce Commission* v. *City of Jackson, Mississippi,* 318 F.2d 1 (C.A. 5). In neither of the above cases is the Commission's authority constitutionally challenged, and said cases are plainly irrelevant to the question presented here. The instant petition presents the first opportunity this Honorable Court has had to determine the constitutionality of the challenged statute.

In directing Your Honors solely to the factual entrance of *United States* v. *Cox,* 342 F.2d 167 (C.A. 5), Certiorari denied, 381 U.S. 935, the Commission seeks to divert your attention from the foundation upon which that constitutional skyscraper was constructed, and also from the legal structure that holds it intact. Clearly, the holding of the *Cox* case is controlling upon, rather than irrelevant to, the constitutional issue presented herein.

As was stated by the Court of Appeals for the Fifth Circuit in the *Cox* case, 342 F.2d 167, at Page 151:

> "The Attorney General is the hand of the President in taking care that the laws of the United States, in legal proceedings and in the prosecution of offenses, be faithfully executed.
>
> "It is as an officer of the Executive Department that he exercises a discretion as to whether or not there shall be prosecution in a particular case."

By reason that the Commission recognizes that the constitutional conflict between the United States Court of Appeals for the Fifth and Seventh Circuits is of such fundamental importance in the conduct of the day to day affairs of our Government, that this Court would surely be compelled to grant Certiorari in order to answer the same, it elects to avoid and misrepresent the basic significance of the conflict posed, upon the constitutional issue now before this Court.

The Circuit Court of Appeals for the Fifth Circuit, in the *Cox* case, does not merely determine that the United States Attorney cannot be compelled by the Courts to sign an indictment. Rather, said cause rests upon the constitutional premise, stated at 342 F. 2d 190, that:

> "The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General."

The Court of Appeals for the Seventh Circuit, (Ap. 3a), in conflict with the *Cox* case, has plainly held that a federal body, non-executive in constitutional character, may enforce the laws of the land, stating:

> ". . . in our judgment, the function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President . . ."

Never could a point be more relevant. Never could such an important issue be in more direct conflict.

The character of an independent administrative agency requires that it be free from the political influence of the Executive Department in the performance of its executive regulatory functions. However, the performance of an executive function by the administrative agency, within the sphere of its own administrative procedure, should not be likened to an exercise of the executive power constitu-

tionally charged to the President. The regulatory function of the Commission in initiating an administrative proceeding, and in the execution of its powers within its own administrative procedures, must be graphically differentiated from the act of initiating and the subsequently conducting a judicial proceeding, on behalf of the "People", to enforce the laws of the United States, inasmuch as a judicial action is solely the exercise of an executive power reserved to the President and his agents, with its attendant political responsibilities to the "People".

To permit Congress to vest the Commission with the executive power that is constitutionally charged to the Attorney General, as an agent of the President, is to enable Congress to accomplish by indirection that which it is prohibited from doing directly.

In order to assure the efficient functioning of a coordinated system of government, it is essential that Your Honors grant the instant Petition for a Writ of Certiorari, and ultimately render a determination that will both enable the Executive Branch of our Government and the independent administrative agency to each freely operate within their respective legal spheres of power and confine the activities of said bodies, each to its respective domain.

Certiorari must be granted to resolve said conflict, if good order among the jurisdictions of this Court, as well as between the three branches of our Government, is to be not only maintained, but restored.

Respectfully submitted,

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EARL G. SCHNEIDER,
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Of Counsel

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OCTOBER TERM, 1965.

CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, Et Al.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

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CHATSWORTH COOPERATIVE MARKETING ASSOCIATION, Et Al.,

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INTERSTATE COMMERCE COMMISSION.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the United States Court of Appeals for the Seventh Circuit:

Petitioner respectfully requests a rehearing of its Petition for Certiorari denied by this Honorable Court's Order of December 6th, 1965.

To refresh the Court as to the nature of the case and the proceedings that took place prior to the order of this Court denying the Petition for Writ of Certiorari, your Petitioner respectfully states that on December 3rd, 1964, a Consent Decree was entered by the United States District Court for the Northern District of Illinois, Eastern Division, granting a permanent injunction against the Petitioner herein; and that said action was commenced pursuant to Section 322(b), 49 U.S.C.A. An appeal was taken from the Order of December 3rd, 1964, to the United

States Court of Appeals for the Seventh Circuit, wherein it was contended that the aforementioned section, upon which the present action was commenced, was unconstitutional.

On June 24th, 1964, the United States Court of Appeals affirmed the Consent Judgment of the District Court; and in so doing; rendered a written opinion, a copy of which was attached to the Petition for Certiorari on Page 1(a) of the Appendix thereof. As a result, the sole and exclusive question presented to this Court was whether or not Article II, Sections 1 and 3, of the United States Constitution, which vests the responsibility of enforcing the laws of the United States in the President, precluded Congress from vesting the same power and authority in a non-executive, completely independent, administrative agency.

REASONS FOR GRANTING REHEARING AND GRANTING THE WRIT.

The duties and responsibilities of this Honorable Court are, to say the least, probably the most awesome with which any one branch of the government could be faced. Included within the obligations of this Court is the responsibility to render a decision to allow the people and the various branches and departments of government to charter their course of conduct in what we consider to be a constitutional society, for through this Court, and only through this Court, can we hope to remain a civilized and constitutionally free society.

Your Petitioner is mindful of the fact that the last, and possibly most inopportune, place to remind an official, or group of officials, of their responsibilities and duties, would be in and before a court. However, it appears that as a result of this Honorable Court's heavy workload, pertaining to cases concerning the recently enacted civil

rights legislation, and the unending re-examination of our constitutional prohibitions against criminal injustice, all of which contain important issues that must, in all fairness, be determined only by this Court, it appears, and might be the case, that this Honorable Court has lost sight of its full and total duties and responsibility to all of the people and all of the branches of government.

The decision of this Court to deny Certiorari in the instant case is a complete abdication by this Court of its duties and responsibilities to the people and to the various branches and departments of government. The issues in the case at bar could not be more clearly drawn. The issue could not be more certainly presented; and unquestionably, the issue could not have any greater national importance and concern.

In denying Certiorari, this Honorable Court has neither affirmed nor rejected the decision of the United States Court of Appeals for the Seventh Circuit in the instant case, nor has it affirmed or rejected the decision of the United States Court of Appeals for the Fifth Circuit, in the case of *U.S.* v. *Cox,* 342 F.2d 167 (1965). Nor has this Honorable Court affirmed or rejected the position taken by the Petitioner that Congress has usurped its power by granting to the Interstate Commerce Commission a power which is, and was, solely and exclusively constitutionally vested in the President of the United States.

The Court must not be unmindful of its obligations and responsibilities to the parties hereto, and also the people of the United States, by assuming, as it may have in this case, that the instant case is an isolated case that will not be of any further concern to either other citizens of the United States or other departments or branches of our government; for if such an assumption were made by the Court in the instant case, the same was a complete and

gross error. There is presently pending in the United States District Court of the District of New Jersey an action by the Interstate Commerce Commission, under case No. 812-65, wherein the Interstate Commerce Commission has again asserted its authority pursuant to the Statute that was challenged in the instant case. It can, to the contrary of assuming isolation, be safely assumed that the Interstate Commerce Commission will look to the instant case as its test case to determine the authority and power that it, as an independent agency, could assert.

In the above-mentioned action filed by the Interstate Commerce Commission, the Interstate Commerce Commission relied solely upon the decision of the United States Court of Appeals for the Seventh Circuit that was rendered in the instant case, to refute the contention that it was proceeding under a statute which was, on its face, unconstitutional, because it attempted to usurp the constitutional power and duty of the President of the United States. The District Court of the United States District of New Jersey had no alternative other than to follow the decision as rendered in the instant case by the United States Court of Appeals for the Seventh Circuit.

This recent development clearly points out that the decision rendered by the United States Court of Appeals in the instant case, is, and will be, considered the law.

Clearly, the duty and responsibility of this Court is to render a decision. Whether or not this Court ultimately decides that the United States Court of Appeals for the Seventh Circuit was correct or incorrect is not now important. What is of present and imminent concern is the fact that a constitutional issue of grave national importance will have been decided by the Court of Appeals without sanction or rejection by this Court.

The fact that the instant case concerns an issue of grave national importance cannot seriously be questioned in view of the recent developments and disputes that have arisen between the Department of Agriculture and the Interstate Commerce Commission. It must be pointed out that the life-blood for the farmers in our country in getting their products to market at a competitive price, and at the same time allowing the ultimate consumer to be benefited by not having high inflationary prices for farming productivity, is through farming cooperative associations which would allow the farmer to transport his product. The Interstate Commerce Commission has attempted to curtail the transportation activity of the farmer cooperative associations, because it is apparently seeking to gain control over all types of transportation activities.

The aforementioned position was clearly indicated by the Interstate Commerce Commission, as a result of its investigation and decision in *Cache Valley & Dairy Association,* under Interstate Commerce Commission Docket No. MC-C-3876. In the *Cache Valley* case, the Department of Agriculture found it necessary to request leave to intervene in behalf of the cooperative marketing association involved, so that the former's views, which were in opposition to the views of the Interstate Commerce Commission, could be pointed out.

Subsequent to the *Cache Valley* case, the United States Court of Appeals for the Ninth Circuit, in the case of *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission,* No. 19700, decided August 10th, 1965, rendered a decision contrary to the opinion of the Interstate Commerce Commission, in that it held that backhauling of non-farm products for non-members of the association could be carried on by an agricultural cooperative association.

As a result of the Ninth Circuit's decision, the Interstate Commerce Commission, in the case of *Agricultural Transportation Association of Texas, et al.,* Docket No. MC-C-4028, entered an order on October 19th, 1965, reopening the proceedings for reconsideration. The Department of Agriculture also filed a Petition for Reconsideration; and the same, to the knowledge of your Petitioner, is presently pending.

It should be pointed out that when your Petitioner entered into the Consent Decree in the instant case, backhauling of non-farm, non-member products was expressly prohibited by both the decisions of the Interstate Commerce Commission and the decision of the United States District Court of Oregon, which latter decision was reversed by the United States Court of Appeals for the Ninth Circuit. However, notwithstanding the backhauling issue, it was, and still is, your Petitioner's sincere belief that the constitutional issue, as is clearly drawn in the instant case, is of the utmost importance.

The Department of Agriculture is clearly within the Executive Branch of the Government; and it has, by Congress, been vested with the authority to control the agricultural affairs of our nation. To allow an independent administrative agency to initiate its own legal proceedings in this field clearly divests the Executive Branch of the Government of its right to control the domestic affairs of our nation. The Interstate Commerce Commission is neither responsible, nor answerable, to any one, politically or otherwise. It would become the possessor of a completely unfettered and uncontrolled power, without any checks or balances in behalf of the people and/or other branches of government.

If this Court desires the Interstate Commerce Commission to possess such powers, without any safeguards, then

it should so affirmatively meet its responsibility and state the same by granting Certiorari and rendering a decision in the instant case.

Although it may appear to this Court from the original Petition for Certiorari that the issue concerned herein was isolated, the recent occurrences in the field of the agricultural cooperatives versus the Interstate Commerce Commission, clearly established that the issue generated and raised by the instant case is not isolated, and is of national concern and importance; and the same must not be left without a decision by this Court.

It should be further pointed out that, as was stated in the Petition for Certiorari, it is the contention of your Petitioner that the decision of the United States Court of Appeals for the Seventh Circuit in the instant case was not only unfounded in law and contrary to the precedents set by this Court, but is contrary to, and diametrically opposed to, the decision of the United States Court of Appeals for the Fifth Circuit in the *Cox* case. This Honorable Court refused to grant Certiorari in the *Cox* case, which again can neither be considered a rejection or affirmation of the rules of law promulgated and expressed by the Court of Appeals in the *Cox* case.

It cannot be logically, soundly, or legally refuted that by denying Certiorari in the instant case, and in the *Cox* case, the Court has allowed two diametrically opposed positions regarding the President's exclusiveness in initiating and instituting a judicial proceeding in a court of law. In view of the fact that the issue generated in the instant case is of national importance and national concern, as was aforesaid clearly demonstrated, it is your Petitioner's contention that this Honorable Court must now meet its obligation and responsibility by rendering a decision. Whether the decision be for or against either

of the litigants in the instant case is obviously, at this point, of no real importance. What is of importance and concern is to allow the citizens of the United States, the independent administrative agencies, the Congress, and the President of the United States to know what the law is, so that they may accordingly chart their course of conduct, which would enable them to participate, as well as live, in a constitutionally democratic government. The latter can only be accomplished when this Honorable Court meets its responsibility and obligation by rendering a decision in the instant case.

It should be again pointed out that by neither rejecting nor affirming the decision of the Court of Appeals in the instant case, this Honorable Court will, by its silence, be allowing an independent agency to conduct itself and perform acts which could be completely contrary to the ever-important policy-making decisions of the President. In establishing the policy for our country, the President must be concerned with the will of the People, economic stability, labor and management relations, national security, all for the purpose of achieving domestic and world-wide peace and tranquility.

An independent agency, however, is only concerned with the particular department or phase of life that it has control over.

Two recent examples of administrative agencies proceeding contrary to the decisions of the President, which may result in ultimate chaos to the People, are clearly demonstrated in the Department of Agriculture's confrontation and opposition to and with the Interstate Commerce Commission, as shown in the case of *Cache Valley,* and the recent decision by the Federal Reserve Board to increase the interest rate, effective January 1st, 1966. In

both cases, the administrative agency was concerned only with its particular field.

A decision by this Court, whether it be to affirm or reverse the decision of the United States Court of Appeals for the Seventh Circuit, in the instant case, is absolutely necessary and imperative, for the reasons set forth herein.

It should be further pointed out that one of the landmark cases in the law, *Hickman* v. *Taylor*, 329 U.S. 495, would not exist if this Court did not review its denial of Petition for Certiorari, (327 U.S. 808, 328 U.S. 876).

For the reasons set forth herein, and because of the recent developments in the field of farmers' agricultural cooperatives, and the position being taken by the Interstate Commerce Commission, the case at bar unquestionably merits the review of this Court.

For the reasons set forth herein, and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted; and that upon rehearing, a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Norman Miller

NORMAN MILLER,
Attorney for Petitioner